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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Clifton, Tennessee)

MM Docket No. 96-163
RM-8841

To: Chief, Allocations Branch
Mass Media Bureau

REPLY TO COMMENTS ON REQUEST TO OPEN APPLICATION WINDOW

Clifton Broadcasting Company ("Company"), by its attorney, herewith replies to the September 29, 1997, "Comments on Request to Open Application Window" ("Opposition" ¹) filed by D. Mitchell Self Broadcasting, Inc. ("Self"), in which Self requests that the Chief deny Company's September 4, 1997, "Request to Open Application Window" ("Request"), not release the full text of the Report and Order in this proceeding, and not

¹ Self's Opposition is late-filed. Self cannot circumvent the pleading deadline imposed by Section 1.45(a) of the Rules and Regulations by creatively naming its pleading as "comments" instead of an "opposition". For this reason alone, the Chief can dismiss Self's "Opposition" as untimely, and Company urges the Chief to do so.

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open an application window for the Clifton channel.² In reply, Company shows as follows:

SUMMARY

1. Federal Register publication of a synopsis of the Report and Order in this proceeding did not constitute the release of the full text of the Report and Order, nor did it constitute release of a public notice of the action. As a result, the action never became effective, and an application window never opened. The Allocations Branch was obligated to release the full text of the Report and Order, consistent with the requirements of Sections 1.102, 1.425 and 0.445 of the FCC Rules and Regulations and consistent with its standard practice and procedure. The appropriate remedy is prompt release of the full text of the Report and Order and establishment of an application window that opens and closes after the release date.

² Self also states that it filed on September 25, 1997, a petition for reconsideration of the return of its Clifton, Tennessee, application. Self did not serve Company with a copy of that petition for reconsideration, even though it states that its petition for reconsideration is "inextricably related" to Company's Request. Company requested that Self provide it with a copy of the filing, and Self did so. Company has opposed Self's petition for reconsideration, relying on Company's Request and this Reply.

REPLY

2. Self's Opposition raises an important question: What were Self's responsibilities, as the Petitioner in this proceeding, given the knowledge it had acquired that the Report and Order herein was not "properly released"?

3. Self explains its actions in this proceeding as follows:

Following publication of the *Order* in the *Federal Register*, Self contacted the Allocations Branch on several occasions in an effort to determine whether the *Order* was going to be released, or whether the Branch intended to issue some form of an erratum. The Allocations Branch advised Self that because the *Order* already had been published in the *Federal Register*, the Branch did not intend to release the *Order*, no erratum would be issued, and no further action would be taken concerning the *Order*.

Self then reviewed the Commission's files to determine whether any applications had been filed for the Clifton facility. Upon finding that no applications had been filed in response to the *Order*, Self filed an application for the Clifton facility on July 7, 1997, with the understanding that it would constitute a "first come/first serve" application . . .

Opposition, p. 2.³ Self repeats this recitation of its actions at page 7 of its Opposition, in essentially identical words,

³ In this quotation, Self twice states that the Report and Order was published in the Federal Register. This statement is incorrect, because only a "synopsis of the Commission's Report and Order" was published in the Federal Register, 61 Fed. Reg. 57336 (October 6, 1996). Moreover, the Federal Register synopsis incorrectly states that the full text of the Report and Order had been released.

except to add that "Self prepared and filed the instant application in reliance upon the fact [sic] that the Order was final, and with the reasonable expectation that its application would be processed on a first come/first serve basis." ⁴ Self also states that the Report and Order in this proceeding "has not been properly 'released' by the Commission." ⁵ Opposition, pp. 2, 6.

4. Significantly, Self fails to state precisely when it contacted the Allocations Branch. Keeping in mind that Self was the Petitioner who initiated this proceeding, Company notes that Self did not tender its application during the purported December 9, 1996, - January 9, 1997, application "window" mentioned in the Federal Register synopsis, notwithstanding Self's statement on page 1 of it July 2, 1996, "Petition for Rulemaking" that "[i]f the requested allotment is made, Self Broadcasting will apply for a construction permit for a new FM station on Channel 293A at Clifton, Tennessee." Self does not explain whether: (a) it was unaware of the purported application

⁴ Self does not explain the use of the different terms "understanding" and "reasonable expectation" or how it came to arrive at either state of mind.

⁵ The use of the term "properly" is confusing. It suggests that the Commission might "improperly" release a Report and Order. An "improperly released" Report and Order might be one that the Commission had not yet adopted. But Self does not offer an explanation for the term "properly". In any event, for this proceeding, the only important fact is that the Commission did not release the full text of the Report and Order that it had adopted.

"window", while it was open, because the full text of the Report and Order was not released and because Self had not read the Federal Register synopsis, or (b) Self contemporaneously knew about the Federal Register synopsis and the purported "window" but intentionally chose not to file an application on or before January 9, 1997. If the latter is the case, then why did Self choose to take such a course of action? Under Self's interpretation, it presumably would run the risk that a third party might tender an application on January 9, 1997, and preclude consideration of an application that Self would file after the "window" closed ⁶

5. What is quite apparent at this point is that Self is seeking to take advantage of an innocent staff mistake to preclude the filing of competing applications. To the extent Self believes that it has been "substantially prejudiced", any such prejudice is of a private nature only, in that others, including Company, may tender mutually exclusive applications for Channel 293A at Clifton.

⁶ While it is only speculation, Company submits that the most reasonable conjecture is that Self did not become aware of the Federal Register synopsis until after the purported "window" had closed. If it had known in time of the purported "window", then it would have sought out the full text of the Report and Order and accordingly filed an application during the purported "window" (regardless of its ineffectiveness) consistent with its prior commitment set forth in its petition for rulemaking. Self probably did not become aware of this situation until shortly before it filed its application in early July, because it would be commonplace to file an application as quickly as possible after learning of the situation.

6. The public interest is obviously served by a choice among applicants, either by the selection of the best comparative applicant or by obtaining auction proceeds for the Treasury. Any possible delay in the inauguration of a new service at Clifton is the result of an innocent mistake and the inadvertent failure of the staff to follow the Commission's Rules and Regulations and its well-established procedures. This mistake is remedied by promptly releasing the full text of the Report and Order and opening a window. The fact that multiple applications might be filed during such a Clifton window does not harm the public interest any more so than all of the other application windows that the Chief has opened and which proceedings remain in suspension while the Commission decides how to implement its new authority to conduct broadcast auctions.

7. As a result of the failure to release the full text of the Report and Order, one of the actual consequences was the failure by the Commission to list Channel 293A, Clifton as an allotment in its own FM database. At the time Self tendered its application on July 7, 1997, Channel 293A, Clifton was listed as only a proposed allotment. Thus, as far as the FCC itself was concerned, evidenced by maintenance of a frequency database, Channel 293A had not been allotted to Clifton, Tennessee, as of July 7, 1997.

8. Another result of the failure to release the full text of the Report and Order was that those members of the public

who routinely monitor the FM allocations process by reviewing the Commission's Daily Digest and obtaining copies of the daily releases, did not know about the action.⁷ That unquestionably impaired the filing of applications, and thus the public interest, evidenced by the fact that none were filed during the purported "window". In this regard, neither the Commission nor the Allocations Branch has ever announced a policy that it would henceforth refrain from releasing the full text of any Report and Order and that the Federal Register synopsis would be the definitive word on allotments and application windows. Instead, the Allocations Branch has continued its standard practice of releasing the full text of its Reports and Orders. Self maintains that the Federal Register synopsis provided "all of the essential information contained in the" Report and Order. Opposition, pp. 2 (n. 2), 4. However, how can anyone know that for sure? To this day no member of the general public has ever seen the text of the Report and Order, because it has never been released.⁸

⁷ In fact, the general public still does not know what happened in this proceeding, because the only public notice has been of the return of Self's application. The Commission has not given public notice of Company's Request.

⁸ The logical extension of Self's position is that the Commission would never issue the full text of any Report and Order in any rulemaking proceeding of general applicability. It is not difficult to imagine drastic consequences from such a position.

9. In its Opposition, Self takes us on a meandering tour of the Commission's procedural rules. But, ultimately, the reader finds himself wandering in circles and lost in the darkest heart of the forest.

a. Section 1.4 does not apply. By its express terms, the purpose of Section 1.4 "is to detail the method for computing the amount of time within which persons or entities must act in response to deadlines established by the Commission." Self quotes the following portion of Section 1.4(b): "[f]or purposes of this section, the term 'public notice' means the date of any of the following events" (emphasis added). Therefore, the definition of "public notice" in Section 1.4 applies only to Section 1.4 and to no other section of the rules, unless specifically referenced. Furthermore, Section 1.4 establishes a date for commencement of pleading cycles and other deadlines. Section 1.4 does not establish the effective date of Commission action or determine whether or not the Commission is obligated to release the full text of its actions.

b. Section 1.103 is not applicable. Section 1.103 applies only to actions taken by the Commission. It does not apply to actions taken under delegated authority, which is governed by Section 1.102. Therefore, Section 1.102, and not Section 1.103, is the relevant rule with regard to the effective date of the Allocations Branch's Report and Order in this proceeding.

c. Sections 1.429 and 1.115 are irrelevant. It is true that, in these types of rulemaking proceedings, petitions for reconsideration and applications for review must be filed within thirty (30) days of the date of Federal Register publication, pursuant to Sections 1.429 and 1.115 of the Rules and Regulations. But how could any would-be litigant be expected to timely file either a petition for reconsideration or an application for review if the Commission had not announced its intention to deviate from standard practice and if the Commission failed to release the full text of its Report and Order? More substantively, how could any would-be litigant know that or how it had been "injured" and draft a proper and sufficient petition for reconsideration or an application for review, if the Commission never released the full text of the Report and Order? Likewise, how could an agency or a court review the matter, if the full text of the decision had never been released? The solution to these questions is release of the full text of the Report and Order.⁹ But these questions are irrelevant here, because we are not here concerned with administrative and judicial review.

⁹ In response to Self's contention that the Report and Order has become "final", it could not possibly become final if it has never been released. Otherwise, one would face the anomalous situation of having a final order whose precise content is unknown!

10. Rather, we are concerned with the effectiveness of the staff action. Section 1.425 of the Rules and Regulations requires the Commission to "issue a decision" in a rulemaking proceeding, and Section 1.102(b)(1) governs the effectiveness of the action therein.¹⁰ The latter provision provides:

Non-hearing or interlocutory actions taken pursuant to delegated authority shall, unless otherwise ordered by the designated authority, be effective upon release of the document containing the full text of such action, or in the event such a document is not released, upon release of a public notice announcing the action in question.

Everyone unquestionably agrees that the Allocations Branch adopted a written Report and Order in this proceeding, because the Federal Register synopsis says so. Standard practice, for decades, has been to release the written Report and Order, and the Allocations Branch continues to do so to the present day. The Allocations Branch has never stated that it intended to discontinue or deviate from this practice. Accordingly, what is the point of adopting a document that one does not intend to release?

¹⁰ Section 0.445(c) of the Rules and Regulations also provides that "Federal Register publication" is not a substitute for the release of the "complete text of the Commission decision" by the Commission.

11. Section 1.102(b)(1) provides for the circumstance when the staff does not release the full text of its action,¹¹ and this is how the concept of "public notice" is introduced to this discussion. When the staff does not release the full text of its action, then Section 1.102(b)(1) provides that an action becomes effective upon "release of a public notice announcing the action in question." However, Section 1.102 does not define the term "public notice." Section 1.102 does not cross reference Section 1.4 to define the term "public notice", as do other sections of the Commission's Rules and Regulations. Therefore, we can only conclude that, for Section 1.102, the meaning of the term "public notice" is not defined by Section 1.4. Clearly the Allocations Branch did not release a document containing the full text of its action. Furthermore, the Allocations Branch did not release anything labeled "public notice". For that matter, the Allocations Branch did not release any document of any sort.¹² The Branch had to release something to the public, under Section 1.102(b)(1), but it released nothing. Therefore, its action never became effective.

¹¹ An example of a situation where the staff routinely and customarily does not release the full text of its action is the grant of a run-of-the-mill uncontested application for a construction permit or for assignment of a license.

¹² The Federal Register is published by the Office of the Federal Register, National Archives and Records Administration. It is distributed by the Superintendent of Documents, U.S. Government Printing Office. It is not a Commission "printed publication". 47 CFR §0.413.

12. Thus, Self's contentions that "there is no requirement . . . that the FCC 'release' the Order in order for it to become effective" and that the failure to release the Report and Order "has no significance", Opposition, pp. 3, 6, are simply wrong. There was an obligation to release the full text of the Report and Order. Until that was done, an application window could not open.

13. It's a very simple matter. The Allocations Branch releases Reports and Orders every week. This is one case where it didn't happen, by simple inadvertence. There is no need to follow the course outlined by Self, to engage in convoluted, post-facto rationalization to try to justify a mistake and its anti-competitive impact, and to create undesirable precedent. An innocent mistake simply happened, and Company asks the Allocations Branch to quickly fix it and move on.

Respectfully Submitted,

CLIFTON BROADCASTING COMPANY

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October 9, 1997

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CERTIFICATE OF SERVICE

I, Harold K. McCombs, Jr., do hereby certify that I have caused to be served by mail, First Class postage prepaid, this 9th day of October, 1997, copies of the foregoing "Reply to Comments on Request to Open Application Window" on the following persons:

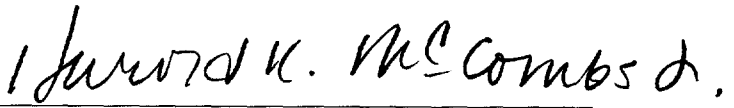
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